Supreme Court of the United States

OCTOBER TERM, 1941.

No. .....

J. EDWARD JONES, PETITIONER,

VS.

JOSEPH P. KENNEDY, JAMES M. LANDIS, GEORGE C. MATHEWS AND ROBERT E. HEALY, RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

OPINIONS BELOW.

The district judge handed down no opinion. The opinion of the United States Court of Appeals for the District of Columbia is reported in 121 F. 2d, page 40. It appears in the record, pages 84 to 89.

JURISDICTION.

The opinion of the United States Court of Appeals for the District of Columbia was filed on March 17, 1941. A petition for rehearing was denied April 26, 1941. This court has extended the time for filing petition for a writ of certiorari to September 4, 1941. The jurisdiction of this court is invoked under Section 240(2) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938).

QUESTIONS PRESENTED.

A statement of the questions presented appears in the petition.

STATUTES AND OTHER AUTHORITIES INVOLVED.

The other statutes involved and the authorities pertinent to the points herein raised are shown in the appendix.

STATEMENT OF THE CASE.

A statement of the case has been given under that heading in the petition. For the sake of brevity that statement is not repeated here.

SPECIFICATIONS OF ERRORS TO BE URGED.

The United States Court of Appeals for the District of Columbia erred in holding that the allegations of the second amended complaint were not sufficient to require the respondents to answer and stand trial.

The United States Court of Appeals for the District of Columbia was in error when it held that the acts alleged to be committed by the respondents were not "palpably and manifestly beyond the scope of the official duties" of the respondents.

The United States Court of Appeals failed to give proper effect to an applicable decision of this court.

The United States Court of Appeals erred in holding that respondents, even though sued in their private capacities, could be represented by attorneys in the service of the United States.

ARGUMENT.

The United States Court of Appeals for the District of Columbia Erred in Holding That the Allegations of the Second Amended Complaint Were Not Sufficient to Require the Respondents to Answer and Stand Trial.

The right to maintain an action against public officers who act beyond the scope of their official authority has always been a troublesome question. This court has not spoken on this subject since *Spalding* v. *Vilas*, 161 U. S. 483. We believe that the time has now come for this court to re-examine and reinquire into this vital matter to the end that justice may be done. We believe that this is a case that calls for corrective action by this court. We endeavor therefore to assemble the pertinent cases dealing with this most important question.

At the outset it is necessary to recognize the established principle of law that public officers acting within the scope of their official duties are immune from suits at law for damages. We find in *Cooper* v. *O'Connor*, 69 D. C. App. 100, 99 F. 2d 135:

> "It may be argued persuasively that all public officers should be required to answer a declaration such as that of appellant and respond on the merits; but the courts have been unwilling to go so far. The situation is one in which there is a serious conflict between considerations of public policy; one, the protection of the individual citizens against oppressive official action, and the other, the protection of the whole people by protecting their officers against vindictive and retaliatory damage suits in order to insure their fearless and effective administration of the law." Citing *Randall* v. *Brigham*, 7 Wall. (U. S.) 523, 536 *et seq.*

And in the same case the court said:

> "There is a general rule that a ministerial officer who acts wrongfully although in good faith is nevertheless liable in a civil action and cannot claim the immunity of the sovereign. There is also a general rule, that if any officer—ministerial or otherwise—acts outside the scope of his jurisdiction and without authorization of law he is liable in an action for damages for injury suffered by the citizen as a result thereof." Citing *Bradley* v. *Fisher*, 13 Wall. (U. S.) 335, 351-352.

Therefore in our amended complaints it was necessary for us to show that the respondents, and each of them, were guilty of "*acts outside the scope of his jurisdiction and without authorization of law.*" We believe that the test laid down by the Supreme Court of the United States in *Spalding* v. *Vilas*, 161 U. S. 483, as to whether the acts complained of "were palpably or manifestly beyond the scope of their official duties" is applicable here. Of course if what the respondents did, they had a perfect right to do and they did in good faith and acted within the proper limits of the law and the authority conferred upon them, and injury resulted to the appellant, then no right of action would accrue to petitioner. As to whether the acts complained of "were palpably or manifestly beyond the scope of their official duties" can be determined only by reading the allegations contained in the complaint filed in the court below. We believe that only casual reading of the various complaints will show that the respondents entered into a conspiracy to destroy petitioner and that their acts were entirely outside the scope of their official duties and were malicious and wilful.

It must never be forgotten that this court, in *Jones* v. *Securities and Exchange Commission*, 298 U. S., page 1, upheld the contentions of the petitioner and delivered a stinging rebuke to the respondents and used perhaps the strongest and most caustic language that ever came from

this court and directed to a department of the government. In the Jones case this court said:

> "The action of the commission finds no support in *right principle or in law. It is wholly unreasonable and arbitrary. It violates the cardinal precept upon which the constitutional safeguards of personal liberty ultimately rest * * * that this shall be a government of laws* * * because to the precise extent that the mere will of an official or an official body is permitted to take the place of allowable official discretion or to supplant the standing law as a rule of human conduct, the government ceases to be one of laws and becomes an autocracy. Against the threat of such a contingency the courts have always been vigilant, and, if they are to perform their constitutional duties in the future, must never cease to be vigilant, to detect and turn aside the danger at its beginning.
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> The admonition of Mr. Justice Bradley in *Boyd* v. *United States*, 116 U. S. 616, 635, should never be forgotten when he said:
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> > 'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and sly deviations from legal modes of procedure. * * * It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *Obsta Principiis.*' "

This court further said in the Jones case:

> "Arbitrary power and the rule of the constitution cannot both exist. They are antagonistic and incompatible forces; and one or the other must of necessity perish whenever they are brought into conflict.
>
> To borrow the words of Mr. Justice Day * * * 'There is no place in our constitutional system for the exercise of arbitrary power.' " Citing *Garfield* v. *Goldsby*, 211 U. S. 249, 262.

Petitioner alleged in his complaint filed in the court below that the respondents were engaged in a general "fishing expedition" when the respondents without any authority of law searched his private papers. This court in the Jones case upheld his contention in this respect when this was said in the opinion:

> "Nothing appears in any of the proceedings taken by the commission to warrant the suggestion that the investigation was undertaken or would be carried on for any other purpose or to any different end than that specifically named. A final inquisition to compel disclosures of fact is not an end but a means to an end; and it is a mere truism to say that the end must be a legitimate one to justify the means. The citizen when interrogated about his private affairs has a right before answering to know why the inquiry is made; and if the purpose disclosed is not a legitimate one, he may not be compelled to answer. Since here the only disclosed purpose for which the investigation was undertaken had ceased to be legitimate when the registrant rightfully withdrew his statement the power of the commission to proceed with the inquiry necessarily came to an end. Dissociated from the only ground upon which the inquiry had been based and no other being specified, further pursuant of the inquiry obviously would become what Mr. Justice Holmes characterized as a 'fishing expedition' * * * for the chance that something discreditable might turn up." Citing *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, 445.

And this court said further in the Jones case:

> "If the action here of the commission be upheld, it follows that production and inspection may be enforced not only of books and private papers of the guilty, but those of the innocent as well, notwithstanding proceeding for registration so far as the power of the commission is concerned has been brought to an end by the complete and legal withdrawal of the registration system."

It is apparent that the Supreme Court, due to the strong language used in its opinion, believed that the re-

spondents were acting far beyond the scope of their authority. We cannot lightly disregard the statement in the opinion that the action of the appellees found no support "in right principle or in law." In other words it must have been apparent that they exceeded their authority and their action was malicious and was wilful. As to the proper definition of the words "right principle" it is only necessary to refer to the ordinary dictionary definition.

In *LeRoy* v. *Tatham*, 14 How. 156, it was stated that principle was a "fundamental truth."

Petitioner well realizes the difficulties confronting him in preparing a complaint that would come within the language of the opinion of *Cooper* v. *O'Connor, supra,* and on that account and also due to the fact that it was alleged that a conspiracy was entered into between the respondents it was necessary to set forth the various links in the chain forming the conspiracy in considerable detail. We believe this to be essential. In 12 C. J. 630, Sec. 216, we find:

> "In an action for conspiracy the rule is to allow great latitude in setting out in the complaint the particular acts from which the conspiracy is to be inferred, even going so far as to allow the individual acts of the conspirators to be averred."

In *Morse* v. *Lewis*, 54 F. 2d 1027, the court said:

> "Conspiracy should be alleged with such particularity as to show unlawful agreement between parties charged."

In *Stoner* v. *Wilson*, 140 Kan. 383, 36 Pac. 2d 999, the court said:

> "From the above-mentioned cases and texts and others which might be cited to the same general effect, it is decided that the mere charging of the conspiracy without stating the facts and circumstances

which warrant recovery against the claimed conspirators is not sufficient and in order that the petition state a cause of action the acts of the parties from which it follows or may be inferred that there was a conspiracy, must be alleged as well as the facts showing that as a result the plaintiff suffered damages for which he is entitled to recover."

Since respondents in the court below raised the objection that the complaint was too *detailed* it is believed that attention should be called to the general rule as to allegations necessary in a complaint alleging conspiracy.

With respect to the action of the respondents which this court denounced in such unmistakable language it is believed that the dissenting opinion of Justice Brandeis in *Olmstead* v. *United States*, 277 U. S. 438, has application here:

"Decisions of this court applying the principle of the *Boyd Case* (116 U. S. 616) have settled these things. Unjustified search and seizure violates the fourth amendment, whatever the character of the paper; whether the paper when taken by the federal officers was in the home, in an office or elsewhere, whether the taking was effected by force, by fraud, or in the orderly process of a court's procedure. From these decisions, it follows necessarily that the amendment is violated by the officer's reading the paper without a physicial seziure, without his even touching it; and that use, in any criminal proceedings, of the contents of the paper so examined—as where they are testified to by a federal officer who thus saw the document or where, through knowledge so obtained, a copy has been procured elsewhere—any such use constitutes a violation of the fifth amendment.

The protection guaranteed by the amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognize the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain,

pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the fourth amendment. And the use, as evidence, in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the fifth." * * *

"And it is also immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but with understanding * * * decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be in peril if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites anarchy. To declare that in the administration of the criminal law the end justified the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face."

It would be interesting to note in view of Justice Brandeis' decided opinion as to a citizen's civil rights just what view he would take of the situation as found in the record at pages 57 to 69.

In *Leong Yau* v. *Carden*, 23 Hawaii 362, 369 (no other citation), the court, after explaining the general rule as to the immunity of public officers, said this:

> "But if he prosecutes without probable cause and with malice he certainly is in no better position than the judge of the court * * * superior or inferior * * * he proceeds maliciously and without any jurisdiction or the head of an executive department who acts maliciously and without color of authority. Public prosecuting officers are entitled to protection against claims growing out of the discharge of their duties done in good faith though with erroneous judgment, but private individuals are entitled to the protection of the law against any conduct of such officers which is at once reckless, malicious and damaging."

In *Schneider* v. *Shepherd*, 192 Mich. 82, 158 N. W. 182, the prosecuting attorney directed the chief of police of Detroit to raid a certain house and arrest the inmates and bring them to police headquarters. This was done upon strength of the report made to him by a private investigator that the place was a disorderly house. It was in fact the home of a reputable citizen who had lived there thirty years. In the suit for false arrest the court said:

> "The investigation of alleged crimes by the prosecuting attorney through private individuals finds no statutory sanctions. If he proceeds upon such a course of action he does so at the same peril as does the unofficial citizen; as this is not a cloak to protect him from liability or a wrong thereby resulting to the innocent person subjected to a false arrest. The statute affords no such robe of immunity nor grants any such power."

It is plain that when a study is made of the allegations contained in the various complaints filed in the district court by petitioner that the conclusion is inescapable that the appellees were not content to perform the work entrusted to them by law but went far beyond the

scope of their official duties. It is difficult to understand how the court below could hold that the respondents were immune from suit when the complaint contained an allegation such as this (Record 59):

> "Plaintiff further alleges that after the defendants gained possession of plaintiff's books, records and files as a result of the unlawful seizure and forcible removal above referred to conspired, combined, agreed and confederated among themselves and with each other to obtain a list of plaintiff's business customers, and did from plaintiff's own books, records and files obtain a list of plaintiff's clients and did thereupon initiate a campaign of abuse and intimidation against said clientele in an effort to shatter and destroy the confidence that said clientele did repose in said plaintiff by sending or causing to be sent to said clients telegrams commanding said clients to appear before said defendants or their agent or agents and bring with them all correspondence, literature and records of their transactions with said plaintiff.

And if there is any doubt as to whether such an activity on the part of respondents would shield them from an action for damages let us consider Paragraph 29 (Record 59):

> 'Plaintiff further alleges that following the dispatch to members of his clientele of such telegrams and in furtherance of said unlawful conspiracy the defendants acting maliciously and without just or probable cause and acting palpably or manifestly beyond the scope of their official duties, the defendants conversed with the members of plaintiff's clientele who came in response to said telegrams, and acting maliciously made false statements with respect to plaintiff and plaintiff's business operations such as "We are going to close Jones' business" and "you had better sue Jones and get your money back" * * *.'

Certainly it could hardly be contended that such activity as this would come within the lawful scope of respondents' authorities as officers of the United States Government. Let us carry it then a step fur-

ther if there any doubt still remains and refer again to Paragraph 31 (Record 60):

> 'Plaintiff further alleges that the defendants, in furtherance of this unlawful conspiracy and acting palpably or manifestly beyond the functions of their office and in an effort to destroy the business of plaintiff, did turn over to plaintiff's competitors the names and addresses of plaintiff's clientele—the names and addresses having been acquired by defendants as a result of said unlawful seizure and forcible removal of plaintiff's books, records and files—and plaintiff's competitors after obtaining the names of plaintiff's clientele immediately began to solicit and prey upon said customers and did thereby induce many of plaintiff's customers to cease business dealings with plaintiff and to deal with plaintiff's competitors * * *.'

It must be apparent that respondents were certainly going wholly beyond the duties of their official stations and in so doing were carrying out the plans of the unlawful conspiracy. Let us refer again to Paragraph 33a (Record 61):

> 'When said unlawful hearings were in progress defendant Flynn made threats to certain of plaintiff's staff; when plaintiff's auditor was waiting in an anteroom to be called as a witness, the defendant Flynn in a threatening and menacing manner said to said auditor—"I am going to get you for this after this hearing is over."'"

There are other instances more striking than those already referred to which illustrate the means used by the participants in this unlawful conspiracy, for instance, we find in Paragraph 35 (Record 63):

> "Plaintiff further alleges that the defendant Kennedy without just or probable cause and acting palpably and manifestly beyond his official functions at a social meeting with a wealthy lady client of plaintiff

wilfully and deliberately misled and deceived said client by representing to said client that the Securities and Exchange Commission had 'closed' the offices of said plaintiff and that said plaintiff was 'not allowed to sell royalties any more,' which statement by said Kennedy was false and known by said Kennedy to be false; that said statement was made without just or probable cause and was malicious and was palpably and manifestly beyond the official functions of said Kennedy; that as a result of this false statement the said lady client did thereupon institute a civil suit in the Municipal Court of the County and City of New York for the recovery of her money invested with said plaintiff; this unlawful act on the part of said Kennedy and which was a part of said conspiracy which had for its object the destruction of plaintiff's business caused great damage to plaintiff in as much as the said lady client upon the strength of false statements made by said defendant Kennedy severed her business dealings with said plaintiff; in addition the plaintiff was put to the trouble and expense of defending said suit in court. It must also be remembered that at the time the false statement was made by the defendant Kennedy that no issue had been adjudicated between the defendants and plaintiff."

It is difficult to conceive how anyone would attempt to justify such conduct on the part of an official of the government as that set forth in Paragraph 35 (Record 63) involving respondent Kennedy, and we cannot overlook the conduct on the part of the respondents as set forth in Paragraphs 36 and 37 (Record 64-66), where an attempt was made by one of the respondents to solicit a bribe from the petitioner with an offer to reveal and expose all the misconduct practiced by the respondents in furtherance of this unlawful conspiracy. There is no question that this actually happened and proper records will verify this fact. Would anyone say that such conduct would come within the legitimate scope of the official duties of a public officer of the United States?

Let us consider briefly the allegations contained in Paragraph 38 (Record 66) which states:

> "Plaintiff further alleges upon information and belief gained from a telephonic conversation had with a high official of the Federal Government, which telephonic conversation was dictographically recorded, that defendant Landis in conversation at Washington, D. C., during the time herein referred to stated categorically that defendants did not 'have anything on' said plaintiff but that said defendants were 'going to get that guy' * * *."

Would anyone say that such conduct on the part of a public officer of the United States Government is within the scope of his official action. As was pointed out in *Cooper* v. *O'Connor, supra,* which sets forth the following:

> "The situation is one in which a serious conflict arises between considerations of public policy—one, the protection of the individual citizen against oppressive official action, and the other, the protection of the whole people by protecting their officers against vindictive and retaliatory damage suits in order to insure that fearless and effective administration of the law."

We believe the language of the court in *Fidelity and Casualty Company, New York,* v. *Brightman,* 53 F. 2d 161, C. C. A. 8 (1931), has some bearing, in that case the court said:

> "The Missouri rule is in line with the general run of authority that a public officer charged with discretionary duties is not liable for a mistake of judgment or an erroneous performance of said duties unless he be guilty of wilful wrong in relation thereto, but as to the ministerial duties he is liable for the violation or neglect thereof, to the party injured thereby, and that a mistake of judgment does not excuse him.

Citing *Cook* v. *Hecht,* 64 Mo. App. 273 (no other citation), which said:

> 'They are not liable so long as they honestly and in good faith perform the work entrusted to them * * *.' "

In the case of *Rowe* v. *Lunstrom*, 57 Pac. 2d 1128, 89 Utah 520, the court said:

> "It is often asserted that where a public officer is by law vested with discretionary ministerial powers and *acts within the scope of his authority* he is not liable in damages for an error in judgment unless guilty of corruption or wilful violation of the law. *He may not however claim immunity for the commission of an act entirely outside the scope of his official duties.*"
>
> See, also, *Schooler* v. *Arrington*, 106 Mo. App. 607, 81 S. W. 469.

It is difficult to understand the opinion of the court of appeals. If this opinion is permitted to stand then the cause of personal liberty in this country will sustain a setback that will take a half century of years to erase. Unless this court reverses the judgment of the court of appeals then the citizen of this country must be at the mercy of an official of an administrative agency. Or to make this stronger and to say it in another way we need only borrow the words of Mr. Justice Sutherland in *Jones* v. *Securities and Exchange Commission, supra*, when he said:

> "* * * that the mere will of an official or an official body is permitted to take the place of allowable official discretion or to supplant the standing law as a rule of human conduct, the government ceases to be one of laws and becomes an autocracy. Against the threat of such a contingency the courts have always been vigilant, and, if they are to perform their constitutional duties in the future, must never cease to be vigilant to detect and turn aside the danger at its beginning. * * *"

It is also difficult to reconcile the opinion of the court of appeals in the light of the concurring opinion of Chief Justice Groner in the case of *Glass* v. *Ickes*, 117 F. 2d,

p. 273, 73 Ct. App. In the Glass case the complaint was based upon a press release issued by the Secretary of the Interior and it was conceded by Glass that the matters contained in the press release were in the main true. That was the sum and substance of the case and yet Chief Justice Groner was inclined to be in doubt as to the correctness of the court's ruling. His dissenting opinion said this:

> "The importance of the principle involved induces me to express my views separately. The opinion, I think, correctly states the rule of privilege applicable to an official of the government. * * * The necessity for the rule is obvious but its cloak of absolute immunity offers such far-reaching opportunity for oppression that it manifestly ought not to be extended beyond the impulse that gave it being."

and he then said this:

> "On the other hand it is quite true that both in this court and the Supreme Court the scope of official authority has been so broadly stated that I am unable to say that the secretary's press release was not in view of the general authority of the secretary concerning the oil industry a matter in 'relation to matters committed by law to his control.' And in this view I am impelled to concur in the opinion, though in doing so I express with great deference the fear that in this and previous cases we may have extended the rule beyond the reasons out of which it grew and thus unwittingly created a privilege so extensive as to be almost unlimited and altogether subversive of the fundamental principle that no man in this country is so high that he is above the law."

When one considers the allegations in the Glass complaint and the allegations in the complaint of petitioner then the reasoning of the court of appeals is difficult indeed to reconcile.

In this connection we also refer to *Colpoys* v. *Gates*, 118 F. 2d, p. 60, 73 Fed. C. T. App. , where the question of government is involved.

In the opinion of the court of appeals we find this:

> "Similarly the carrying out of investigations and the turning over of evidence to the attorney general for presentation to a grand jury come under the authorized duties of the commission. And likewise, plaintiff has not met in these allegations the task of showing acts which fall outside of the immunity."

We find no fault with this. However, our complaint alleges that the respondents turned over to the grand jury false evidence and which they knew to be false. Of course, such a course of conduct would be "palpably and manifestly beyond the scope" of their official duties.

In the opinion of the court of appeals it was stated that the respondents would not be responsible for the acts of their subordinates. The opinion relied on *Robertson* v. *Sichel*, 127 U. S. 507. We submit that the court of appeals did not give proper effect to the opinion of this court in the Sichel case. We have alleged that the respondents were aware of the activities of the subordinates and counseled and directed them as to their part in the conspiracy. We find in 23 American & English Encyclopedia of Law (2d Ed.) 382, the following:

> "It is a well-settled rule that a public officer is not responsible for the acts or omissions of subordinates properly employed by or under him if such subordinates are not in his private service but are themselves servants of the government unless he has directed such acts to be done or has personally cooperated in the act of negligence."

We find in *Fidelity and Casualty Co. of New York* v. *Brightman*, 53 F. 2d 161, the following:

> "It is well settled that public officers are not responsible for acts of subordinate officials, if such subordinates are themselves employees of the government, where there is no negligence on the part of such public officials in employing them unless the superior officer has directed or encouraged or rati-

fied such acts or has personally co-operated therein," citing *Michel* v. *Smith*, 188 Calif. 199, 205 Pac. 113; *Dowler* v. *Johnson*, 225 N. Y. 39, 121 N. E. 48, 3 A. L. R 146; *Barker* v. *C., P. and St. L. R. R.*, 243 Ill. 482, 90 N. E. 1057, 26 A. L. R. (N. S.) 1058, 134 Am. St. Rep. 382."

We say therefore that the test is whether the public officer:

> "Has directed or encouraged or ratified such acts or has personally co-operated therein."

In the instant case there is not the slightest doubt as to the knowledge of respondents Kennedy and Landis. If we look at it from another angle would there be any particular reason or motive for defendants Burns, Flynn and Rabell from carrying out their part of the conspiracy if there was not some superior hand guiding their course of conduct. Of course if in this case we had only the acts of the subordinates and nothing as to Kennedy and Landis then the ruling of *Robertson* v. *Sichel* would clearly apply. In the instant case we say therefore that the respondents Kennedy and Landis are clearly responsible for the acts of Burns, Flynn and Rabell—who participated in one of the most disgraceful episodes in our history. Looking ahead we say that no reasonable prudent juror after reading the various paragraphs of the complaint could conclude that Kennedy and Landis were not aware of it—did not approve it—and did not personally participate in it.

At page 5 of the opinion of the court of appeals reference is made to the action of the commissioners who through Flynn threatened and intimidated the publisher to whom petitioner had submitted his manuscript for publication of his book. It is difficult to follow the reasoning of the court in this regard. Petitioner had a right to submit his material to any publisher and had a right to proceed unmolested. No one had a right to interfere with the free exercise of his civil rights. And in this connec-

tion it must never be forgotten that Section 51, Title 18, United States Code, is still on the books. It is in full force and effect—living, breathing every hour. It provides:

> "If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or the laws of the United States, or because of his having so exercised the same * * * with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than $5,000 and imprisoned not more than ten years. * * *"

Of course this law is being enforced every day. And in this connection it seems permissible to state that had petitioner done any of the things that Flynn had done or Landis or Kennedy—or Rabell or Burns he would have most certainly been called to account. Suppose for the sake of argument that petitioner had attempted (in conjunction with one of his employees) to intimidate, threaten or browbeat one of his investors who stated he was going to make a complaint to the securities and exchange commission. If such a thing happened would there be any doubt in the mind of anyone that petitioner would have had to face a criminal prosecution. It goes without saying that it must be apparent that interference with the civil rights of a citizen must be "palpably and manifestly" beyond the scope of the official duties of an official of the government.

The Right of Attorneys in the Employ of the Government and Paid by the United States Treasury to Appear on Behalf of Respondents Who Are Sued in Their Private Capacities.

Petitioner contends that Chester T. Lane, George A. McNulty and Robert E. Kline, Jr., who are attorneys in the employ of the United States Government, have no right to appear in this case on behalf of the respondents

who are sued in their official capacities. In our judgment a very serious question arises in this case since the respondents are sued in their private capacities and there is no authority justifying the United States Government expending public money in the defense of such suit. We believe that the ruling in *Booth* v. *Fletcher*, 101 F. 2d 678, 69 D. C. App. 351, is not determinative of this question.

In the Fletcher case the litigants were represented by certain officers of the United States Government in accordance with existing law. In the Fletcher case this court pointed out that Sections 309 and 316, Title 5, United States Code Annotated, provided for representation by the attorney general or certain representatives of the Department of Justice, but it is our view that such representative must be specifically authorized by statute.

In the case of the respondents Messrs. Kline, McNulty and Lane were appointed attorneys for the Securities and Exchange Commission by virtue of the Act of June 6, 1934 (Section 78A, Title 15, United States Code Annotated). That particular section provides:

> "The commission is authorized to appoint and fix the compensation of such officers, attorneys * * * as may be necessary for carrying out its functions under this chapter."

The attorneys above referred to draw their salaries from the public treasury and their duty is to the government and they are not permitted to come into court except on behalf of the Securities and Exchange Commission. They cannot appear in the court in a private capacity.

Objection was made in the court below to the appearance of these attorneys but the objection was overruled. Petitioner believes it was essential that he challenge the authority of such representation.

In the case of *Pueblo of Santa Rosa* v. *Fall*, 273 U. S. 315, the Supreme Court, speaking through Justice Sutherland, said:

> "The trial court of this court has power at any stage of the case to require an attorney or one of its officers to show his authority to appear."

Citing *The King of Spain* v. *Oliver*, 2 Wash. C. C. 429, where Mr. Justice Washington, sitting in the circuit court, said:

> "It would be strange if a court whose right and whose duty it is to superintend the conduct of its officers should not have power to inquire by what authority an attorney of that court undertakes to sue the defendant in the name of another—whether that other is real or fictitious—and whether its process is used for the purpose of vexation or fraud instead of that for which alone it is intended. The only question can be as to the time and manner of calling for the authority and as to the remedy, which are in the discretion of the court and ought to be adapted to the case."

Petitioner contends that it is essential that proper representation be had in the case. We find in *Reynolds* v. *Fleming*, 30 Kan. 106, 1 Pac. 61, and *G. W. Mining Company* v. *Woodmas*, 12 Colo. 46, 20 Pac. 771, the following:

> "A judgment resting on the authorized appearance of an attorney is absolutely void."

* * * * * * *

and it is submitted therefore that the attorneys in the employ of the United States Government have no right to appear on behalf of the respondents and we say that the holding of the court below was error and should be reversed.

It is believed that the facts set forth in the various complaints filed by petitioner in the court below are matters of considerable moment and if unchecked constitute a real threat to civil liberty in the United States. It is doubtful indeed if after a careful, thorough and painstaking examination of authorities that any case decided by this court since its foundation will reveal that this tribunal ever used language so denunciatory as that used in the opinion *Jones* v. *Securities and Exchange Commission, supra.* When this court characterized the conduct of respondents as one

"having no support in right, principle or in law"

that court must have been truly alarmed over the activities and the grave peril of liberty, if the activities of respondents were not checked.

We cannot overlook what was said in the case of *The United States* v. *Lee,* 106 U. S. 196:

> "No man in this country is so high that he is above the law. No officer of the law may state that law at defiance with impunity. All the officers of the government from the highest to the lowest are creatures of the law and must obey it."

Petitioner is not unmindful of the great difficulty confronting him in preparing a complaint that will come within the rule laid down by this court, but it is believed that the complaints filed in the courts below do measure up to the test required in *Cooper* v. *O'Connor, supra,* and that the demurrer should have been overruled, the motions to dismiss should have been denied and the respondents required to answer and stand trial so that the petitioner would be permitted to have a jury of his peers pass upon the merits of his allegations as law and justice requires.

In conclusion it suffices to say that each passing day brings to our mind the realization that we must be con-

stantly on guard against any encroachment upon the rights of the citizen. As was recently said by Granville Clark, chairman of the American Bar Association's Committee on the Bill of Rights:

> "World events are bringing the people of America to the realization that the freedom which we enjoy is disappearing in a large part of the world. These events have fortunately brought about a new concern for the safeguarding of American liberties and institutions.
>
> On the other hand they have produced new tensions and intolerances. It is an opportune time to remind the legal profession and the general public to be on their guard against the impairment of any of the basic rights of Americans."

What happened to petitioner can happen to any citizen of the United States unfortunate enough to incur the ill will of a dictatorship in the guise of law enforcement. It must be checked at its source. The maxim of the tyrant "might makes right" must not again occur in this country. The policy of "rule or ruin" must gain no foothold in our system of government. Equal justice under law must be ever the rule in our country.

It follows from what has been said that the petitioner has definitely made out a case and the action of the court below in dismissing his complaint was error and the judgment should therefore be reversed and the cause remanded to the district court for further proceedings.

It must never be forgotten what was said by this court in *United States* v. *Lee*, 106 U. S. 196:

> "No man in this country is so high that he is above the law. No officer of the law may state that law at defiance with impunity. All the officers of the government from the highest to the lowest are creatures of the law and must obey it."

Petitioner well realizes that the allegations made by him are very serious indeed. The allegations of miscon-

duct are far-reaching in scope and most certainly cast grave doubt on the honesty and integrity of certain officials of the government. The petitioner merely asks that he be given his day in court—that he be given an opportunity to prove his allegations—which he can do beyond any question of a doubt. Of course, if petitioner does not support his contentions he cannot recover. Petitioner is well aware of this. It would seem that the respondents should be anxious and willing to remove from their names the stigma of the charges made in the allegations of the complaint and should welcome an opportunity to rebut and contradict the charges in open court. It would seem that it would be in the interest of justice to require the respondents to answer this complaint and to stand trial. If they are innocent of the charges they have nothing to fear in a court of law.

Conclusion.

In conclusion it is respectfully submitted that a writ of certiorari to the United States Court of Appeals for the District of Columbia should be granted.

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